In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1905

DOLLAR GENERAL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The court of appeals did not issue an opinion. The decision and order of the National Labor Relations Board (Pet. App. 19-36) are reported at 204 NLRB No. 106.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1974 (Pet. App. 36-37). The company's petition for rehearing was denied on May 2, 1974 (Pet. App. 38). The petition for a writ of certiorari was filed on June 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the company violated

Section 8(a)(3) and (1) of the National Labor Relations Act by discharging three employees because of their union activities.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 39-40.

STATEMENT

A. The Board's Findings of Fact

Petitioner Company employs approximately 20 truck drivers at its warehouse-distribution facility in Scottsville, Kentucky (Pet. App. 20-21, 26, n. 6; A. 3, 6, 39, 54).[1] In June 1969, the Company discharged office employee Barbara Mayes because she was observed in a Scottsville restaurant complaining to a union representative about working conditions.[2] In September 1969, the Company's drivers launched a union campaign and the Company responded with employee interrogations and threats. On November 30, 1969, 9 or 10 drivers held a meeting at a local church known as the "Tabernacle" to discuss employee response to the discharge, the previous day, of an employee active in the union campaign. This meeting was under surveillance by a supervisor who was the son-in-law of the Company president. Shortly thereafter, the Company discharged four other employees who attended the November 30 meeting. On March 25, 1971, the Board found that the Company's interrogations, threats, surveillance, and discharges during the September-November 1969 campaign violated Section 8(a)(3) and (1) of the Act.[3]

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[1] "A." refers to the appendix to the briefs in the court below.

[2] On March 3, 1970, the Board found that this discharge violated Section 8(a)(3) and (1) of the Act. See 189 NLRB at 302.

[3] 189 NLRB 301, 305, 311-312.

The present case arises from a union campaign which was initiated in November 1971.[4] During that month, driver Otis J. Hurt, Jr., began soliciting for Local 89, International Brotherhood of Teamsters, in drivers' homes, Scottsville restaurants, and on Company property. (Pet. App. 22; A. 53-54, 56). Pursuant to this solicitation, drivers Marvin Billingsley and Kenneth C. Isenberg signed union authorization cards (Pet. App. 22; A. 43, 62). Both Billingsley and Isenberg had attended the November 30, 1969 meeting which was the subject of the Company's illegal surveillance (Pet. App. 22; A. 41-42, 47, 61-62).

On December 20, 1971, Hurt, Billingsley, and Isenberg were temporarily laid off for lack of work, but were recalled by February 24, 1972 (Pet. App. 22; A. 50-51). After recall, Hurt, Billingsley, and Isenberg continued openly to urge other drivers to join the Union, soliciting them at the shop and at restaurants frequented by the drivers (Pet. App. 22; A. 45-46, 56, 62-63).

On June 1, 1972, the court of appeals issued its judgment enforcing the Board's order requiring reinstatement of the 5 employees who had been fired because of their activities in the September-November 1969 union campaign.[5] Thereupon, the Company offered the 1969 discriminatees reinstatement and, on July 3, 1972, this offer was accepted by three of them (Pet. App. 23; A. 70-71). On July 7, 1972, Personnel Director Tim Turner called Hurt, Billingsley, and Isenberg into his office and handed each a letter that noted the reinstatement order and stated, "Because of this action by the Labor Board, the company is now termi-

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[4]The Board in the present case took official notice of the two prior Board proceedings against the Company.

[5]*National Labor Relations Board* v. *Dollar General Corporation*, 489 F. 2d 733 (C.A. 6).

nating your job" (Pet. App. 24; A. 77-79). Turner added orally that their work was satisfactory and that he would give them favorable job recommendations if they desired (Pet. App. 23-24; A. 38, 57, 64).

According to Company Vice President Cal Turner, Jr., since the reinstatement order left the Company with more drivers than trucks, he decided to terminate three other drivers to make room for the 1969 discriminatees. After discussion with Warehouse Manager Polston and Personnel Director Tim Turner, Cal Turner, Jr., allegedly concluded that Hurt, Billingsley, and Isenberg had exhibited a "negative attitude" since their recall and therefore they would be discharged (Pet. App. 23; A. 70-71). Tim Turner testified, however, that he had no knowledge of this alleged bad attitude; Polston did not testify at the Board hearing (Pet. App. 28; A. 36). Moreover, on June 19, 1972, after the Company had received notice of the court's reinstatement order, it hired a new driver, Morris (Pet. App. 29; A. 49). And, by September 1, 1972, the Company had lost three drivers and hired another new driver (Pet. App. 27; A. 49-51), but it never sought to recall Hurt, Billingsley, or Isenberg (Pet. App. 24).

B. The Decisions Below

The Administrative Law Judge found that the Company's background of anti-union animus, coupled with its precipitate discharge of three known union activists shortly after its receipt of the reinstatement order, provided *prima facie* evidence that this discharge was discriminatorily motivated (Pet. App. 25-26). He also found that the record failed to support the Company's contention that economic necessity required the discharge of three drivers to make room for the employees reinstated on July 3, 1972, and that the only evidence concerning the "negative attitude" of Hurt, Billingsley, and Isenberg after their recall was

that they were openly and actively pro-union during that period (Pet. App. 26-31). Accordingly, based on the entire record, the Administrative Law Judge concluded that these employees were discharged in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 31).

The Board adopted the decision of the Administrative Law Judge. It ordered the Company to cease and desist from the unfair labor practices found, to reinstate the three discriminatees and make them whole for losses suffered, and to post appropriate notices. (Pet. App. 33-35.) The court of appeals found that the Board's decision was supported by substantial evidence and enforced its order (Pet. App. 36-37).

ARGUMENT

The only issue presented by this petition is whether substantial evidence supports the Board's finding, sustained by the court below, that Hurt, Billingsley, and Isenberg were discharged because of their union activities. Such an evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502. In any event, there is no substance to the Company's claim (Pet. 11, 14) that the Board based its findings in the instant case solely on the discriminatory discharges found in the previous cases. The Administrative Law Judge, whose findings were adopted by the Board, carefully considered all the evidence presented, including the Company's defenses, which did not withstand scrutiny and indeed served only to buttress the strong *prima facie* evidence of discrimination adduced by the General Counsel (Pet. App. 25-31). Nor did he err in viewing the facts in the instant case against the background of peti-

tioner's previous, similar unfair labor practices. It is well settled that prior unfair labor practices are relevant in determining the motivation underlying subsequent conduct. See *National Labor Relations Board* v. *Monroe Auto Equipment Co., Hartwell Division*, 420 F. 2d 861, 862-863 (C.A. 5), certiorari denied, 399 U.S. 927; *Maphis Chapman Corp.* v. *National Labor Relations Board*, 368 F. 2d 298, 300, 303-304 (C.A. 4).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1974.

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[6]The Company's contention that the court below confused the facts of this case with the prior cases involving it (Pet. 9-10) was presented to the court below in a petition for rehearing. The court denied the petition as lacking in merit (Pet. App. 38).